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NO. 92-517

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Counsel opposite's asserted factual recitations, in addition to painting a distorted picture of the critical issue raised by this Petitioner are also inconsistent and contradictory in several critical respects. For example, we concede that "on March 23, 1989" Val

King (who had referred to Petitioner as a friend who would do anything for him **[Vol. II, p. 511]**), is credited with assuring the undercover "agent that he had a friend (Petitioner) who could launder cash successfully in 10 to 14 days" (**Brief For The United States In Opposition, p. 2**). It is also inconfutable, contrary to the implication in the government's position, that the only agreement reached that day, according to agent Monaghan, was that they would, in the future, meet and King would bring Payne to the meeting (**Tr., Vol. I, p. 144**). (Also see **Petition for Writ, p. 24, n. 2.**) The Record of Monaghan's testimony shows that he fully understood considerable discussions had to take place before there could be any agreement. (See **Tr., Vol. I, pp. 306-307.**)

The critical point here is well made when one credits the fact that on several occasions during this conversation, Monaghan (the agent) made the statement that "we are just talking or bullshitting". (**Tr., Vol. I, p. 308.**) Monaghan stated he flavored his conversations with these ingredients because he was "asking

possible scenarios as to how money could be moved..." (ibid). Payne testified he took this tenor of the conversation to mean no commitments were being made at that time (**Tr., Vol. II, p. 900-901**). (Also see **Petition For Writ, pp. 18-19**.)

This compelling interpretation of agent Monaghan's testimony is further buttressed by the categorical statement that he understood some further discussions between petitioner and King were going to take place and that any firm agreement between the parties would have to take place in the future (**Tr., Vol. I, p. 319**).

With the above showings as givens, the fact that petitioner in testifying "in his own defense ... acknowledged meeting with the undercover IRS agent on March 31, 1989" (**Brief For The United States In Opposition, p. 3**), hardly justifies the further statement that the purpose of the meeting was "to discuss laundering drug proceeds" (**ibid**). Indeed, there is no evidence whatsoever that supports any conclusion that petitioner was even

aware drug money was to be discussed at the meeting.

Also, it is a gross distortion of the Record of testimony before this Court to even suggest that petitioner ever "claimed he withdrew from any conspiracy following the meeting" on March 31, 1989. Proof this is a brazen distortion is fully established from a mere perusal of page 11, footnote 7 of the Government's Brief. There the government fully recognizes and credits the fact to be, as was the case, that Payne was contending he withdrew before any conspiracy that included him was ever formed. Here, it should be emphasized that this very point was called to the Appellate Court's attention in the Petition filed therein for Rehearing. There it was specifically stated that:

> ... Payne never testified he withdrew from any conspiracy. What his evidence showed was that no conspiracy including him was ever formed. And, that to the extent it can be said an agreement was reached on March 31, 1989, he withdrew from being a party to any such agreement before the April 4, 1989 Overt Act that would have

reopened any possible agreement into a conspiracy was committed.

Petition For Rehearing En Banc (filed in The Sixth Circuit Court of Appeals) at p. 5. (Also see, **Brief For The United States In Opposition, p. 13, n. 7.**)

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 1

With specific reference to point 1 of the **Brief For The United States In Opposition** (pages 5-7), it could not be clearer why the government would have this Court consider the Rule 801(d)(2)(E) and confrontation issues on the basis of general principles and regard their requirements as having been satisfied simply because the government said so.

Now we do recognize this Court did conclude, in **Bourjaily v. United States, 483 U.S. 171 (1987)**, that "Lonardo's" reference to a friend who he said would be at a certain location, when his transaction with the government's informer went down, coupled with the friend's appearance at the time and involvement in the transaction that took place was enough to validate, under favor of

Rule 801(d)(2)(E), the admission of prior references to this friend. But this holding cannot be said to validify the government's position here that "King's statements to Coyle and the undercover IRS agent concerning petitioner's [possible] membership in the conspiracy were confirmed by petitioner's own admission made on March 31, 1989 when he participated in the meeting that King had arranged...." **(Brief For The United States In Opposition, p. 6.)**

So postured, the government's further contention that the considerable testimony, of the same type, "regarding the laundering of the undercover IRS agent's original $50,000" **(ibid)**, is likewise flawed. Indeed, in making its argument on this point the government again resorts to an outright distortion of the evidence. This it does when making the argument that these "prior co-conspirator statements were admissible against ... [petitioner] because he subsequently joined the money laundering conspiracy" **(Brief For The United States In Opposition, pp. 6-7)**.

The point of critical significance here is that even the

undercover IRS agent, in this case, testified that any deal contemplated with Payne was to be regarded as being independent from his prior deal with the lawyers (who had been involved with the other monies) with whom he repeatedly stated he did not want to have any further dealings with. **(Tr., Vol. I, pp. 305-307.)**

Even this is not all. The fact that the government argued to the jury that the conspiracy charged in this indictment came into being on March 31, 1989, in the wake of the meeting itself on that date, if nothing else, is inconsistent with the argument that this was the same conspiracy that included the lawyers.

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 2

Having obviously reached the decision that this Court can be subliminally influenced by the way the government's arguments are structured, it is not surprising that we are told (in the government's argument no. 2) that: "[a] withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, ..." and that this "Court has long held that a

defendant who claims that he withdrew from the conspiracy must show some 'affirmative action' constituting withdrawal." **(Brief For The United States In Opposition, p. 8.)**

Of course, the validity of the above tenets when viewed in isolation cannot be disputed. But they are really inapt here. This follows because, as argued by the government, if Payne withdrew from a conspiracy, the fact that the burden of proof on the issue of withdrawal was placed on him would be harmless **(id., pp. 12-13)**.

On this narrow point it should suffice here to note that what petitioner is precisely contending is well expressed in the Eleventh Circuit's Pattern Instruction, No. 518. There it is stated:

> If a Defendant enters into a conspiracy agreement but later changes his mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the Defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

(Emphasis supplied.) See the Ninth Circuit's Pattern Instruction, No. 8.05D. Also see **United States v. Heathington, 545 F.2d 972 (5th Cir. 1977)**.

Clearly then, if we credit the thrust one gets from the Eleventh and Ninth Circuit's Pattern Instructions, referred to above, one can see the why for the following additional quote from the **Government's Brief**. Here we are being told:

> Even if the defense [of withdrawal] is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts, but instead simply serves as a foundation for other defenses, such as a statute of limitations claim.

Brief For The United States In Opposition, p. 8.

The government's failure to reckon with the fact that petitioner is not claiming that he withdrew from any conspiracy, but is contending he withdrew before any conspiracy including him was ever formed, is really significant here. In our judgment it evidences an obvious hope the Court will simply look past the

presence of this flaw (and others) in the government's ratiocinations and look past the presence of these serious conflicts in the Circuits on the basic withdrawal issue.

So postured, the Court should really note with interest that the government's efforts to get away from the positions taken by the Seventh Circuit in **United States v. Read, 658 F.2d 1225 (7th Cir. 1981)**, and more recently in **United States v. Rossy, 953 F.2d 321, 325 (7th Cir.), cert. denied 112 S.Ct. 1240 (1992)** and the other cases relied on to support our thesis.[1] In the effort to do so counsel-opposite could only come up with what must be called a pathetic response. The reference here is to the really hollow argument that:

> Given the continuing intra-circuit conflict on ... [withdrawal] issue, the Seventh Circuit may [eventually] be persuaded to reconsider the issue en banc. If the Seventh Circuit follows

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[1] Not cited by the government as also providing support for our thesis is the Fifth Circuit case of **United States v. Heathington, 545 F.2d 972 (5th Cir. 1977)**.

> the decisions of ... [some] of the other circuits, it would eliminate any need for review by this Court.

Brief For The United States In Opposition, pp. 11-12.

Having made the above statement, and apparently realizing its shallowness, the government again returns to its favorite theory, i.e., that even if the jury had been properly instructed the result would have been the same. This we are told is so because "[a]t the time of ... [the March 31, 1992] meeting, petitioner['s] co-conspirators had already reached an agreement to launder drug proceeds, and they had committed numerous overt acts in furtherance of the conspiracy" (**Brief For The United States In Opposition, p. 12**).

The problem with understanding the government's thesis in this regard is that it ignores the fact that at the trial the government made the argument that on March 23rd, their undercover agent had met with Frank Coyle and Val King and during this meeting it was represented that Payne (who was not present) "was interested in

laundering money". And, the government contended that "the first overt act [which made for the conspiracy] was that a decision was made to meet with Hubert Payne" (**Closing Argument, Tr., Vol. II, pp. 1046-1048**). (Also see **Petition For Writ Of Certiorari, pp. 23-24**.) Distilled, the government's trial theory then was that at the March 23rd meeting the agreement element required for the conspiracy conviction was satisfied by the things Val King said about Payne (ibid) and that Payne's presence at the March 31st meeting resulted in the formulation of the charged conspiracy.

So postured, telling this Court petitioner's claimed "withdrawal after overt acts had been performed" comes too late (**id., p. 12**), without telling us what acts are being referred to and without indicating where they were specifically charged in the indictment hardly satisfies the requirements of due process here.

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 3

This brings us to the government's argument no. 3, pages 13-14. The fact that the argument itself simply credits the fact of

Payne's acquittal for the substantive money laundering offense as being a non-factor in the asserted conclusion that the evidence here demonstrates Payne "was a central figure in the conspiracy" (**id., p. 14**), really says a lot. Not only does this contention lack substance, it ignores a basic reality. Simply stated it is hard to understand how Payne can be regarded as "a central figure in a conspiracy" to launder money in the wake of the fact that the co-defendant was in fact convicted of the substantive offense charged in the indictment and Payne was acquitted of that offense.

Also, the denial of the acceptance of responsibility credit (**Guidelines, §3E1.1**) cannot be defended on the theory that it was here -- that is, because Payne testified his conduct did not qualify him for conviction; inasmuch as, the evidence in his view was insufficient to make him a conspirator.

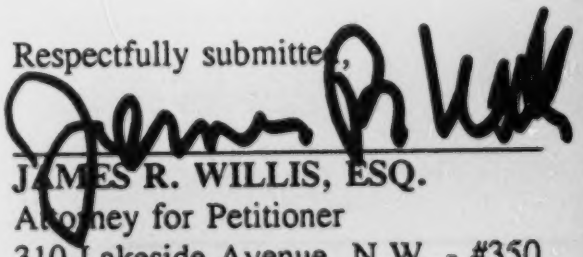
CONCLUSION

The most puzzling aspect of the government's various arguments, particularly with reference to the withdrawal issue, is

that it really defies logical analysis. Indeed, only the government would dare make the argument, made herein, that the conflict between the Circuits on a very specific issue should be left unresolved because the Seventh Circuit, which provides the chief support for petitioner's thesis, may eventually "reconsider the issue en banc ... [and] eliminate any need for review by this Court" **(Brief For The United States In Opposition, pp. 11-12).**

Also we recommend to the Court, as a further reason why Certiorari should be granted, the various arguments made in support of the **Petition For Rehearing**. These arguments are set forth in their entirety as Appendix "B", in the **Appendix to the Petition For Writ of Certiorari** filed in this case. They are incorporated herein by reference.

Respectfully submitted,



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